UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DENNIS GALLIPEAU, Plaintiff,	:	
v.	:	CA 03-152ML
SCOTT C. BAER, ESQ., Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Plaintiff's Motion to Dismiss ("Motion to Dismiss" or "Motion") (Document #57). Plaintiff has filed this Motion pursuant to Fed. R. Civ. P. 12(b)(6), seeking dismissal of the counterclaims pled by Defendant for failure to state a claim upon which relief can be granted. This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). The court has determined that no hearing is necessary. After reviewing the memoranda submitted and performing independent research, I recommend that the Motion be denied.

Facts and Travel

A detailed summary of the facts which give rise to this litigation is contained in this Magistrate Judge's Report and Recommendation of November 21, 2003 ("11/21/03 R & R") and need not be repeated here. In brief, Plaintiff alleges that during the course of a collection action in the state district court Defendant, who represented Plaintiff's creditor, obstructed the judicial system by threatening to have Plaintiff arrested (Count I), filed a false report with the police which accused Plaintiff of check fraud (Count II), libeled Plaintiff (Count III), and

violated the state statute prohibiting extortion and blackmail (Count IV). See Amended Complaint (Document #41).

The travel relevant to the instant Motion begins with Plaintiff's filing of an Amended Complaint on January 7, 2004. Defendant responded to the Amended Complaint on January 9, 2004, by filing Defendant's Answer to Amended Complaint and Counterclaim ("Answer/Counterclaim") (Document #42). The Counterclaim consists of two counts. Count I, which is captioned "Abuse of Process," Answer/Counterclaim at 1, alleges, among other things, that Plaintiff "has brought this action without basis and upon knowingly false allegations against the Defendant ...," id. at 2. Count II of the Counterclaim, which is captioned "Debt on Judgment," id., alleges that Plaintiff "owes Defendant the sum of $1,050 based upon a final judgment obtained in the state court," id.

On January 20, 2004, Plaintiff filed a Motion to Strike and for Rule 11 Sanctions ("Motion to Strike") (Document #44), seeking to strike as improper the six affirmative defenses and two counterclaims which Defendant had pled in his Answer/ Counterclaim. On February 5, 2004, the Court denied the Motion to Strike, finding that Defendant's affirmative defenses and counterclaims were not foreclosed by the court's 11/21/03 R & R (as Plaintiff had seemingly argued) and that "they may properly be advanced and should not be stricken." Order Denying Motion to Strike and for Sanctions ("Order Denying Motion to Strike") (Document #50) at 3-4.

Apparently unaware of the denial of his Motion to Strike, Plaintiff on February 9, 2004, filed a reply memorandum in which he requested that the Motion to Strike be treated as a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Plaintiff's Reply Memorandum (Document #53). The court denied this request on February 10, 2004, see Order Denying Plaintiff's Request to

Treat Motion to Strike as Motion to Dismiss Pursuant to Rule 12(b)(6) (Document #54), noting that the Motion to Strike had already been denied when the reply memorandum was filed, see id.

Plaintiff then filed the instant Motion to Dismiss (Document #57) on February 18, 2004. Defendant's Objection to Motion to Dismiss and Request for Costs (Document #58) was filed that same date.

Standard of Review

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court construes the complaint in the light most favorable to the plaintiff, see Greater Providence MRI Ltd. P'ship v. Med. Imaging Network of S. New England, Inc., 32 F.Supp.2d 491, 493 (D.R.I. 1998); Paradis v. Aetna Cas. & Sur. Co., 796 F.Supp. 59, 61 (D.R.I. 1992), taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences, see Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v. Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995); Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994).[1] If under any theory the allegations are sufficient to state a cause of action in accordance with the law, the motion to dismiss must be denied. See Hart v. Mazur, 903 F.Supp. 277, 279 (D.R.I. 1995). The court "should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts." Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996); accord Conley v.

[1] Because Plaintiff here is moving to dismiss Defendant's counterclaims, the standard of review must be adopted to the circumstances of this case. Accordingly, references in this paragraph to the "complaint" should be read as the "counterclaim" and references to "plaintiff" should be read as "counterclaim plaintiff" (i.e., Defendant). Thus, the court construes the counterclaims in the light most favorable to Defendant, taking all well pleaded allegations as true and giving Defendant the benefit of all reasonable inferences.

Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also Arruda v. Sears, Roebuck & Co., 310 F.3d at 18 ("[W]e will affirm a Rule 12(b)(6) dismissal only if 'the factual averments do not justify recovery on some theory adumbrated in the complaint.'").

Discussion

The court notes initially that Plaintiff in his memorandum has reversed the numbers of Defendant's counterclaims. See Memorandum in Support of Plaintiff's Motion to Dismiss ("Plaintiff's Mem.") at 1-2 (incorrectly stating that Count I asserts a claim for $1,050.00 based on a state court judgment against Plaintiff and that Count II "'is for malicious prosecution and abuse of process,'" id. at 2 (quoting an unidentified document)). A far more serious failing is Plaintiff's practice of placing statements in quotation marks and attributing them to Defendant without identifying the document from which the quotation is purportedly taken. See id. at 1-5. The document filings in this action now exceed fifty, and the court declines to search through the multiple filings by Defendant in an effort to locate the alleged quotations to which Plaintiff refers.

Moreover, Plaintiff's arguments miss the mark because he focuses on the unidentified quotations rather than on the actual language of the counts of the Counterclaim. Plaintiff in effect sets up straw men (allegedly with straw provided by Defendant) and attempts to knock them down. The court bypasses these arguments and confines itself to determining whether Plaintiff has shown that the factual averments of the Counterclaim counts do not justify recovery on some theory outlined therein. See Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002).

I. Count I of Counterclaim (Abuse of Process)[2]

To prove an abuse of process claim, a plaintiff "must demonstrate that (1) the defendant instituted proceedings or process against the plaintiff and (2) the defendant used these proceedings for an ulterior or wrongful purpose that the proceedings were not designed to accomplish." Butera v. Boucher, 798 A.2d 340, 353 (R.I. 2002)(citing Nagy v. McBurney, 392 A.2d 365, 370 (R.I. 1978)); see also Labonte v. Nat'l Grange Mut. Ins. Co., 810 A.2d 250, 254 (R.I. 2002)("An 'action of abuse of process provides a remedy for a claim arising when a legal procedure, although set in motion in proper form, has been perverted to accomplish an ulterior or wrongful purpose for which it was not designed.'")(quoting Nagy v. McBurney, 392 A.2d at

---

[2] Defendant in his memorandum refers to his "abuse of process and malicious prosecution claims." Memorandum in Support of the Defendant's Objection to Motion to Dismiss and Request for Costs ("Defendant's Mem.") at 1. However, "malicious prosecution and abuse of process ... are two distinct causes of action." Hillside Assocs. v. Stravato, 642 A.2d. 664, 667 (R.I. 1994). Defendant has not pled the elements of the tort of malicious prosecution. See id. ("Malicious prosecution or malicious use of process has been 'defined as a suit for damages resulting from a **prior** criminal or civil legal proceeding that was instituted maliciously and without probable cause, and that terminated unsuccessfully for the **plaintiff** therein.'")(bold added); see also Kingstown Mobile Home Park v. Strashnick, 774 A.2d 847, 858 (R.I. 2001)(same); Clyne v. Doyle, 740 A.2d 781, 782 (R.I. 1999)(per curiam)(same); cf. Rezendes v. Beaudette, 797 A.2d 474, 478-79 (R.I. 2002)("[T]o prove a claim of malicious prosecution, the party bringing the action must prove that the opposing party (1) initiated a prior criminal proceeding against him or her, (2) that there was no probable cause to initiate the proceeding, (3) the proceeding was instituted maliciously, and (4) the proceeding terminated in his or her favor.")(internal quotation marks omitted). Furthermore, separate causes of action should be pled in separate counts. See Fed. R. Civ. P. 10(b); Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 905 (11th Cir. 1996)(citing "the principle that separate, discrete causes of action should be plead in separate counts."). Thus, Count I of the counterclaim pleads only abuse of process and not malicious prosecution.

370). As examples of such an ulterior or wrongful purpose, the Rhode Island Supreme Court has cited a husband who instituted an action for custody of his children, in whom he had shown little interest, solely in order "to make good on his threat to make [his wife's] life a living hell," Wright v. Zielinski, 824 A.2d 494, 499 (R.I. 2003)(citing Heal v. Heal, 762 A.2d 463, 465 (R.I. 2000))(alteration in original)(internal quotation marks omitted), and a defendant who prosecutes an innocent plaintiff for a crime with reasonable grounds but with the ulterior motive to extort payment of a debt, Hillside Assocs. v. Stravato, 642 A.2d 664, 667 (R.I. 1994)(citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121 at 897-98 (5th ed. 1984)).

Applying the foregoing case law to the present action, to prove his abuse of process claim, Defendant must demonstrate that (1) Plaintiff instituted proceedings or process against Defendant and (2) that Plaintiff used these proceedings for an ulterior or wrongful purpose that the proceedings were not designed to accomplish. See Butera v. Boucher, 798 A.2d 340, 353 (R.I. 2002). It is indisputable that Plaintiff has instituted the present action against Defendant. Thus, the first element of Defendant's abuse of process claim is present. See id.

Turning to the second element, while Defendant has not specifically alleged in Count I of the counterclaim that Plaintiff instituted this action with the ulterior motive of retaliating against Defendant for obtaining a judgment and sanctions against Plaintiff in the state district court, such an inference can be drawn from the averments of the Count. See Answer/Counterclaim at 2 ¶¶ 1-4. Specifically, Defendant alleges: 1) that he represented a client in a collection action against Plaintiff in the state district court; 2) that he obtained a judgment against Plaintiff on behalf of the client and sanctions against Plaintiff; 3) that Plaintiff brought the

present action without basis and upon knowingly false allegations; and 4) that Plaintiff is motivated solely by malice in bringing this action. See id. For purposes of the present Motion, these allegations must be taken as true. See Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002). Giving Defendant the benefit of all reasonable inferences, see id., a jury could find that Plaintiff brought this action with the ulterior motive of retaliating against Defendant for prosecuting the collection action and for obtaining sanctions against Plaintiff. Consequently, the second element of an abuse of process claim is also present.

Based on the above analysis, the court finds that Count I of the Counterclaim adequately pleads an abuse of process claim. Because it is not a certainty that Defendant will be unable to recover for this claim "under any set of facts," Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996), the Motion to Dismiss Count I of the Counterclaim should be denied. Accordingly, I so recommend.

II. Count II of the Counterclaim (Debt on Judgment)

Defendant has pled in Count II of the Counterclaim debt on judgment, alleging that Plaintiff owes Defendant $1,050.00 as a result of a final judgment obtained in state court. See Answer/ Counterclaim at 2 ¶ 6. Debt on judgment is a valid cause of action under Rhode Island law. See Trahan v. Trahan, 455 A.2d 1307, 1312 (R.I. 1983)(recognizing the action as an available remedy to collect a money judgment).

Plaintiff does not challenge the existence of the cause of action, but argues that "Defendant did not obtain a final judgment against the plaintiff in the amount of $1,050.00." Plaintiff's Mem. at 1. Plaintiff fails to understand that for purposes of the present Motion, the court must accept Defendant's averments as true. See Arruda v. Sears, Roebuck & Co., 310 F.3d

13, 18 (1st Cir. 2002). Thus, the fact that Plaintiff disputes the finality of Judge Erickson's order is not a basis for finding that Defendant has failed to state a claim upon which relief can be granted.

Even if the court were to consider Plaintiff's arguments as to this Count, the basis for his claim that the order was not a final judgment is unclear. Plaintiff admits that on December 12, 2002, Judge Erickson of the state district court signed an order awarding Defendant attorney's fees totaling $1,050.00, see Plaintiff's Mem. at 1, and that Plaintiff's motion to vacate that order was denied without a hearing on January 14, 2003, see id. at 4. Plaintiff does not state that he appealed the order, and there is nothing in the record to indicate that he did. Given these facts, the court sees no basis for finding that the order was not a final order.

The court notes that the Rhode Island Supreme Court has considered appeals of orders imposing monetary sanctions. See Heal v. Heal, 762 A.2d 463, 470 (R.I. 2000); Lembo v. Lembo, 677 A.2d 414, 419 (R.I. 1996). Because "appeals may be taken only from final judgments or orders which have such an element of finality that action is called for before the case is finally terminated in order to prevent clearly imminent and irreparable harm," Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 748 (R.I. 1995)(internal quotation marks omitted), this court concludes that under Rhode Island law orders imposing monetary sanctions constitute final judgments at least after the underlying action has reached a conclusion, cf. Camp v. Camp, 59 F.3d 548, 555 (5th Cir. 1995)(finding under Texas law that sanctions order was final and constituted a valid judgment).

Plaintiff also contends that Defendant "hoodwink[ed] the state court judge," Plaintiff's Mem. at 4, into awarding Defendant monetary sanctions. However, there appears to have

been no finding by any state court to this effect, and the sanctions order apparently remains in effect. Furthermore, this court does not review the correctness of an order issued by a state court concerning a matter within the state court's jurisdiction. See Sheehan v. Marr, 207 F.3d 35, 39 (1st Cir. 2000)(explaining the Rooker-Feldman doctrine[3] and holding that "[t]he Rooker-Feldman doctrine prohibits federal district and circuit courts from reviewing state court judgments."); accord Picard v. Members of Employee Ret. Bd. of Providence, 275 F.3d 139, 145 (1st Cir. 2001). To the contrary, federal courts are bound to give full faith and credit to orders of state courts. See 28 U.S.C.A § 1738 (2000); see also Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32 (1st Cir. 1991)("[W]e must give full faith and credit to what the Delaware courts have lawfully found and ordered."); N.H. Motor Transp. v. Town of Plaistow, 881 F.Supp. 695, 701 (D.N.H. 1994)("[A] federal court must accord a state court judgment the same preclusive effect which it would be given under the laws of the state where judgment was entered.").

In short, the court finds that Count II of the Counterclaim states a claim upon which relief can be granted. On the facts alleged, a jury could render a judgment in favor of Defendant. Accordingly, as to the second count of the Counterclaim, I recommend that the Motion be denied.

III. Defendant's Request for Costs

Defendant requests his costs, specifically attorney's fees in the amount of $150.00 to compensate him for .75 hours of time expended defending against the present Motion. See Memorandum in Support of the Defendant's Objection to Motion to Dismiss and Request for Costs ("Defendant's Mem.") at 2; id., Attachment

[3] For an explanation of the Rooker-Feldman doctrine and of the two cases from which its name is derived, see Sheehan v. Marr, 207 F.3d 35, 39 (1st Cir. 2000).

(Affidavit in Support of Counsel Fees). In support of his request, Defendant notes that the present Motion is similar to Plaintiff's previous Motion to Strike (Document #44) which the court denied, see Defendant's Mem. at 1, that in denying that motion the court found that Defendant's Counterclaims "may properly be advanced and should not be stricken," Order Denying Motion to Strike (Document #50) at 3-4, and that the court cautioned Plaintiff "that he must have a good faith basis for any motion which he files and the lack of such basis could result in the imposition of costs, including attorney's fees,"[4] id. at 4 n.2.

The above described circumstances could justify imposition of the requested attorney's fee. However, because it is possible that Plaintiff failed to understand or fully appreciate what constitutes a "good faith basis for any motion which he files," Order Denying Motion to Strike at 4 n.2; see also Show Cause Order at 1 n.1, this Magistrate Judge, in a final instance of deference to Plaintiff's pro se status, will not recommend the imposition of the requested attorney's fees. The court is also influenced by the fact that Defendant's statements may have contributed to Plaintiff's misapprehension as to what cause of action was being alleged in Count I of the Counterclaim.[5]

Nevertheless, the court agrees with Defendant that he should not have to continue to expend time responding to frivolous motions. The arguments made by Plaintiff in support of the Motion to Dismiss demonstrate a lack of understanding of Rule 12(b)(6) and of the standard to be applied to such motions. In light of the fact that Plaintiff was himself the beneficiary of

---

[4] The court included the same admonition in the Show Cause Order (Document #51). See Show Cause Order at 1 n.1.

[5] See n.2 supra.

the lenient Rule 12(b)(6) standard when this Magistrate Judge recommended against dismissal of Counts 1 and 4 of the Complaint, see 11/21/03 R & R at 16-17 (stating standard), Plaintiff's failure to appreciate how application of that same standard here precludes the granting of the present Motion is troubling. The court cannot ignore the possibility that Plaintiff is engaged in a vendetta against Defendant and that Plaintiff, unless restrained, will continue to file motions which are similarly without basis. Accordingly, **Plaintiff is explicitly warned that any future filings which do not have at least some supportable basis in both law and fact will make him subject to an award of attorney's fees**. Good faith as used by the court here does not merely mean that Plaintiff honestly and sincerely believes in the correctness of his motion. Plaintiff must be able to demonstrate that there is some recognized legal and factual basis for the motion such that it cannot be deemed frivolous.

Conclusion

For the reasons stated above, I recommend that Plaintiff's Motion to Dismiss be denied as to both counts of the Counterclaim. I further recommended that Defendant's request for attorney's fees be denied. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

DAVID L. MARTIN
United States Magistrate Judge
February 26, 2004